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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 340

DOEHLER METAL FURNITURE CO., INC., PETITIONER

v.

LINDSAY C. WARREN, COMPTROLLER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court delivered no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 10) is reported in 129 F. (2d) 43.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered June 15, 1942 (R. 14). The petition for a writ of certiorari was filed August 27, 1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a Government contractor may maintain an action for a declaratory judgment against the Comptroller General in regard to a disputed item in the settlement by the Comptroller General of a claim against the contractor.

STATUTES INVOLVED

The Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, as amended by Section 405 of the Act of August 30, 1935, c. 829, 49 Stat. 1027 (28 U. S. C., § 400), provides in part:

> In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

Section 236 of the Revised Statutes, as amended by Section 305 of the Act of June 10, 1921, c. 18, 42 Stat. 24 (31 U. S. C., § 71), provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

STATEMENT

On December 22, 1938, the petitioner was awarded a Government contract, in the gross amount of $92,391.80, for the delivery of certain supplies to the War Department (R. 3). Article 5 of the contract provided that upon the failure or refusal of the contractor to make deliveries of the materials or supplies within the time specified, the Government could by written notice terminate the right of the contractor to proceed, purchase similar materials or supplies in the open market, or secure their manufacture and delivery by contract or otherwise, and hold the contractor and his sureties liable "for any excess cost occasioned the Government thereby" (R. 3–4). The Government accepted delivery of slightly under $9,000 worth of supplies, but thereafter declared the contractor in default under the provisions of Article 5 and terminated the contractor's right to proceed (R. 3, 6). The undelivered supplies called for by the contract were then obtained by the Government under a new contract, awarded to the Equipment & Furniture Corporation after readvertising (R. 6). The Comptroller General in his Notice of Settlement of Claim, directed to petitioner, determined that it had cost the Government $104,290.19 to obtain the supplies not delivered by petitioner (R. 4, 6) and that such supplies would have cost the Government $82,607.77 under the contract with petitioner, so that the excess cost was $21,682.42.

The Comptroller General then allowed petitioner credit for supplies delivered under its contract and for certain amounts due to it under other transactions, and finally determined that the petitioner was indebted to the United States in the sum of $12,711.85 (R. 7–8).

The petitioner, dissatisfied with the settlement of claim, brought an action for a declaratory judgment against the Comptroller General (R. 3). Petitioner did not and does not now challenge the right of the Government to terminate its contract, obtain the supplies elsewhere and charge it with the added cost. Petitioner disputed only the amount of its liability. The complaint alleged that the cost to the Government of the supplies obtained under the readvertised contract was $94,-881.57 instead of $104,290.19 as stated in the Comptroller General's settlement, and that therefore the excess cost for which it was liable under the contract was $12,273.80, $9,408.62 less than the $21,-682.42 determined by the Comptroller General (R. 4). The reason and nature of the dispute were nowhere stated.[1] The complaint simply al-

[1] We are informed by the Assistant Comptroller General that the difference of some $9,000 between the "excess cost" figures of the Comptroller General and those of the petitioner arises from a dispute as to whether there should be allowed to petitioner the amount of liquidated damages collected from the completing contractor, the Equipment & Furniture Corporation, by reason of certain delays in the delivery of material. The Comptroller General did not allow such liquidated damages in determining the excess

leged that the dispute existed and that the Comptroller General refused to accept "the applicable rule of law" (R. 3–4). The complaint then prayed (1) that the court declare the excess cost to be "the difference between the contract price and the sum actually paid out in completing the same"; (2) that the court declare the amount of such excess cost in accordance with petitioner's contention; and (3) that the court enter "an appropriate order for the release" of the sum of $9,408.62 (R. 4).

The district court granted respondent's motion to dismiss the complaint. The court below affirmed the judgment of the district court (R. 10, 14).

ARGUMENT

The court below correctly held that it had no power to review by a declaratory judgment the action of the Comptroller General in the settlement of petitioner's claim. Prior to the enactment of the Declaratory Judgment Act the courts would not have reviewed his action in this respect by mandamus or injunction, not because those remedies were procedurally defective, but because the courts would not interfere with or set aside an exercise of executive or administrative discretion by an officer acting within his jurisdiction. The Declaratory Judgment Act does not enlarge the power or duty of the courts to review administrative action but simply supplies a new procedural

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cost to be charged against petitioner. See Appendix, *infra*, p. 10.

device for adjudicating the cases and controversies that the courts formerly would hear. These two controlling principles are well settled and were correctly applied below. Consequently, there is no occasion for further review by this Court.[2]

1. Prior to the enactment of the Declaratory Judgment Act it was well settled that a complaint like petitioner's furnished no basis for relief against the Comptroller General. Congress has committed to the General Accounting Office the settlement and adjustment of "all claims and demands whatever" by or against the Government. Rev. Stat. § 236, as amended by Section 305 of the Act of June 10, 1921, c. 18, 42 Stat. 34 (31 U. S. C., § 71). A party whose claim has been rejected by the accounting officers is free to pursue his remedy against the United States by an appropriate action to secure any money due (*Longwill* v. *United States,* 17 C. Cls. 288; see *St. Louis, Brownsville & Mexico Ry. Co.* v. *United States,* 268 U. S. 169, 174) and relief also may be obtained against the Comptroller General by mandamus or injunction[3] if the payment is so plainly owing that his

[2] There is no conflict of decisions, but none could arise because the Comptroller General may be sued in his official capacity in the federal courts only in the District of Columbia. Cf. *Butterworth* v. *Hill*, 114 U. S. 128.

[3] Rule 81 (b) of the Federal Rules of Civil Procedure abolishes the writ of mandamus, and provides that the "relief heretofore available by mandamus * * * may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

duty to authorize payment is merely ministerial. *Smith* v. *Jackson*, 246 U. S. 388; *McCarl* v. *Cox*, 8 F. (2d) 669 (App. D. C.); see *Miguel* v. *McCarl*, 291 U. S. 442, 456; Mansfield, *The Comptroller General* (1939), 110 *et seq.* There is no authority, however, for any other type of judicial review or supervision of the Comptroller General's settlements. Mansfield, *Administrative Finality and Federal Expenditures* (1938), 47 Yale L. J. 603, 614–617; Mansfield, *Judicial Review of the Comptroller General* (1935), 20 Cornell L. Q. 459, 470. And relief by mandamus or injunction plainly does not extend to a case like the present, which, as the court below pointed out, apparently involves the review either of issues of fact or of questions of law that called for the exercise of discretion and judgment by the Comptroller General. *United States ex rel. Carroll Electric Co.* v. *McCarl*, 8 F. (2d) 910 (App. D. C.); *McCarl* v. *Rogers*, 48 F. (2d) 1023 (App. D. C.); *Brunswick* v. *Elliott*, 103 F. (2d) 746 (App. D. C.). This is but an application of the general rule that mandamus or injunction will not lie "to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in respect of either" (*Wilbur* v. *United States*, 281 U. S. 206, 218). See also *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324–325; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; cf. *Work* v. *Rives*, 267 U. S. 175. In such cases mandamus and injunction are unavailable not because

there are procedural difficulties or because the law or equity court could not fashion a remedy; they are unavailable because the courts will not interfere in the decisions of administrative and executive officers and thus upset the normal operations of the Government. *Decatur* v. *Paulding*, 14 Pet. 497; cf. *Adams* v. *Nagle*, 303 U. S. 532.

2. Petitioner conceded below (R. 12), and appears to concede here, that it could not have obtained a writ of mandamus or an injunction, but urges that it is entitled to relief under the Declaratory Judgment Act because there is an actual controversy between it and the Comptroller General. But assuming that such a controversy exists,[4] nevertheless no relief can be awarded under the Declaratory Judgment Act because the controversy is, as we have shown, the kind of controversy in which the courts will not interfere. The operation of the Declaratory Judgment Act is procedural only. *Aetna Life Ins. Co.* v. *Haworth*, 300

[4] It may be questioned whether the "actual controversy" required by the Declaratory Judgment Act can be made out in this case. The controversy, under that Act, must be "definite and concrete, touching the legal relations of parties having adverse legal interests." See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; Borchard, *Declaratory Judgments* (1941 ed.), 40 *et seq.* By failing to show how the $9,000 variance in the estimate of excess cost arose, or upon what dispute of fact or law it is based, the record here falls short of presenting a definite and concrete controversy between petitioner and the Comptroller General. See *Agnew* v. *Hoage*, 99 F. (2d) 349 (App. D. C.).

U. S. 227, 240. The Act does not broaden the scope of judicial supervision over the executive and administrative branches or authorize the courts to control to any larger extent than before the action of executive and administrative officers. *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 101 F. (2d) 426 (App. D. C.), affirmed on other grounds, 306 U. S. 56; *Love* v. *United States*, 108 F. (2d) 43 (C. C. A. 8), certiorari denied, 309 U. S. 673. The very objections which barred judicial review of the action of the Comptroller General on petition for mandamus and injunction also forbid interference on a complaint for declaratory relief.

3. The denial of the petition will work no hardship upon petitioner. The issues raised by it may be fully litigated either in appropriate proceedings brought by petitioner under the Tucker Act whenever it claims a net balance due in its favor, or as a defense in any suit brought by the United States to enforce its claim for the excess cost.[5]

[5] The United States is not a party; hence there is no question here as to whether the petitioner could obtain declaratory relief against the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1942.